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IN THE

Supreme Court of the United States

No. 552

INTERSTATE TRANSIT LINES,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To United States Circuit Court of Appeals
For the Eighth Circuit.

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Citations.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Interstate Transit Lines respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered on July 31, 1942, in a cause numbered and entitled on its Docket No. 12247, Interstate Transit Lines, Petitioner, vs. Commissioner of Internal Revenue, Respondent, affirming the decision of the United States Board of Tax Appeals. Petition for rehearing was denied September 8, 1942.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals is reported at 44 B.T.A. 957. The opinion of the Circuit Court of Appeals is reported at 130 Fed. (2d) 136.

STATUTE INVOLVED.

The Statute involved is section 23(a) of the Revenue Act of 1936, 48 St. L. 1658 (set out, *infra*, in the appendix).

SUMMARY STATEMENT OF MATTER INVOLVED.[1]

(Numerals in parentheses refer to pages[2] of the printed record.)

This proceeding is an income tax case involving the taxable year 1936. The Board of Tax Appeals (now the Tax Court), in a decision rendered July 9, 1941 (21) found a deficiency in petitioner's income tax for 1936 in the sum of $4,461.53, 44 B.T.A. 957. The Circuit Court of Appeals affirmed (86) 130 Fed. (2d) 136. This petition is to obtain a review of that decision.

Substantially all of the deficiency is predicated upon the disallowance by the Commissioner of an item of $28,100.66, which represents the amount by which operating expenses, in 1936, of a wholly owned and dominated subsidiary, Union Pacific Stages of California (herein for brevity referred to as "Stages"), exceeded the latter's operating revenue. The taxpayer, the petitioner (herein sometimes referred to as "Interstate"), actually, and without any offsetting benefit or consideration other than the subsidiary's conduct of taxpayer's business operations in California, both interstate and intrastate, bore the

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[1] In this summary evidence concerning details of accounting is omitted as not relevant to the question of the propriety of a review by this court. Only so much of the evidence is summarized herein as bears upon the question of the subsidiary's agency for the parent taxpayer, and that of the effect of the assumption by one corporation, pursuant to contract, of payments to another corporation conducting operations on the former corporation's behalf of otherwise deductible expense items, these being the questions involved here, as to which the law is, taxpayer believes, in a very unsettled state, with the decisions in hopeless conflict.

[2] Page references are to the printed copies filed herewith. The paging of the original differs slightly, in that portion setting out the Circuit Court of Appeals proceedings.

burden of this deficit, which resulted entirely from operations performed in California by Stages for the petitioner. This was done pursuant to a contract between Interstate and Stages entered into in 1932. No part of the claimed deduction represented any advance for capital purposes, and but for the allocation, as between the two companies, hereinafter mentioned, to Stages of revenues and expenses from California interstate and intrastate business, would without any question be proper to reflect as a deduction. There is no dispute over the items producing the figure of $28,100.66. The Commissioner disallowed it on the stated ground that "no provision of the Revenue Act of 1936 authorizes such deduction" (9). Taxpayer claims the deduction under section 23(a) of the Revenue Act of 1936, 48 St. L. 1658, as an "ordinary and necessary expense" of carrying on its business.

The facts are not in dispute. Interstate Transit Lines, a Nebraska corporation, has since 1929 been engaged in the interstate bus transportation business between Chicago and Los Angeles, and Kansas City and Cheyenne, and had by 1930 acquired the right to handle intrastate business in numerous states, but not California. The Railroad Commission of that State (probably erroneously under the State law) had a settled policy of refusal[1] to

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[1] The Commission's policy appears to have been bottomed on a California Statute passed in 1927. Section 50¼ of the California Public Utilities Act (Deering's General Laws of California, 1931, Act 6386, page 3561, incorrectly given as page 3161 on page 5 of Transcript), adopted in 1927 (Session Laws, 1927, p. 74; amended in 1931 in a manner not here material, Session Laws, 1931, p. 2598), provided in part:

> "No passenger stage corporation shall hereafter operate or cause to be operated any passenger stage over any public highway in this state without first having obtained from the railroad commission a cer-

issue to a foreign corporation the prerequisite certificate of convenience and necessity for the conduct of intrastate business. Whether or not the Commission prior to 1930 correctly construed the California law (which the marginal footnote references, *infra*, indicate was most doubtful) there was in 1936 no State statutory inhibition in effect which in that year would have prevented Interstate from carrying California local passengers. Because, however, of the attitude of the California Commission, Interstate

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tificate declaring that public convenience and necessity require such operation."

However, Section 26 of the California Public Utilities Act (Deering's 1935 Supplement to California General Laws, Act 6386, page 1622), in effect throughout 1936, contains the following proviso:

> "provided, that foreign corporations engaging in commerce with foreign nations or commerce among the several States of this Union may transact within this State such commerce and intrastate commerce of a like character; and, provided, further, that any foreign corporation, which may comply with the laws of this State respecting foreign corporations, and which owns at least ninety per cent of the outstanding capital stock of any other foreign corporation transacting a public utility business in this State, may succeed to the public utility business, franchises and rights of such latter corporation and, thereafter continue and carry on such public utility business."

The first five lines of the foregoing (to the semicolon) have been in effect since 1915 (Session Laws, 1915, p. 130). The balance of the above language was added by the 1935 amendment (Session Laws, 1935, p. 1564). Whether or not the 1927 amendment (appearing as Section 50¼, *supra*) affected Section 26 as it existed prior to 1927, the 1935 amendment, just quoted, reenacting Section 26 as it had been and adding the second proviso, makes it clear that it was in effect in 1936.

appeared unable itself, prior to and during 1930, to carry intrastate passengers. Being desirous to secure that traffic and add the revenue therefrom to its interstate revenue (36) and thus obtain additional passengers for vacant seats in its through buses without having to incur additional expenses (38), taxpayer for this purpose in 1930 organized Stages under the California laws. By 1932 Stages had, with the State Commission's approval, secured the franchise necessary for intrastate operation. Interstate furnished all Stages' capital and received all its stock. (No part of this capital investment is in any way involved in the present proceeding.)

Formal contracts, dated February 7, and 8, 1932 (respectively referred to as the "absorption" and "operating" agreements) were executed by parent and subsidiary. Neither contract was suggested by or involved any element of tax avoidance, or at the time made had any tax significance, one way or the other, because the companies then filed consolidated returns. The "absorption" contract recited among other things that Stages was maintained as an operating subsidiary of taxpayer and that its operations were conducted solely for Interstate's benefit, and provided, among other things, that Interstate would "assume and reimburse the California corporation for any deficits incurred by the California corporation in its operations" (Petitioner's Exhibit 1, 61-63). It was pursuant to this provision that the taxpayer assumed and bore Stages' 1936 deficit, $28,100.66, the sole item here in controversy.

The "operating" agreement provided, in substance, that buses of Interstate (which had theretofore operated its buses through to Los Angeles) should on each trip continue through, but at the State line should pass into Stages'

custody and that Stages' buses[1], traveling northward, were at the State line to pass into Interstate's custody. Each party leased its buses to the other, while thus in the other's custody, for five cents per bus mile while in such custody, the lessee in such instance to bear expenses (other than drivers' wages and taxes) and insurance properly attributable to the buses while in its possession. Drivers were to be the employes of and their wages paid by the lessee while in service in connection with leased buses, the effect of which was to make drivers the formal employes of Stages while in California and of Interstate when outside of California. (All drivers were actually paid by Interstate, *infra*, p. 7.) Each party was to pay taxes on its own buses (Petitioner's Exhibit 2, 63-65).

The pleadings admit (15) the very important fact (thereby making it a verity in this case) that Interstate, the taxpayer, was during 1936 engaged in the operation of motor buses for the transportation of passengers between Chicago and Los Angeles. Notwithstanding this admitted fact, no part of the net cost of that operation, \$28,100.66, has been held deductible[2]. Ignoring this admission, both tribunals below treated Interstate's supposed want of authority to transact California intrastate business as a decisive factor; but by 1936 there was no longer any lawful impediment to the transaction by Interstate of local

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[1] Two buses were bought in 1932, nominally by Stages, with capital funds contributed by Interstate. These were "operated in a pool with the parent company's buses" (39).

[2] The Circuit Court of Appeals ignored this formal admission of one of the important facts involved, and, although conceding (92), *arguendo*, in effect that the deficit arose from Interstate business, erroneously said (*ibid*) that the deficit was "an incident attributable wholly to the business of the subsidiary".

business, and at no time was there ever any impediment to Interstate's transaction of interstate business in which the respondent has, in his pleading, admitted taxpayer was itself engaged in 1936. The cost of taxpayer's operation, through Stages, of both interstate and intrastate business was not attributable to intrastate operation; for under the arrangement outlined, the California local business continued to be handled without any additional expense, on the same buses previously operated by the taxpayer (38). There were the same schedules and no physical changes whatever, the only change being in bookkeeping. There was no break in the operation of buses or change of passengers at the State line, and no additional expense was created by the California local business except possibly a slight additional expense in accounting (18; 38, 39). The trifling and even nebulous character of this additional expense, if such there was, is pointed out in testimony (46) which is uncontroverted, and in the opinion below is assumed to be the fact (92) *infra*[1]. Therefore the expense which produced the deficit in question was the expense of conducting the interstate business of the taxpayer.

The record amply establishes the fact that Stages was but a branch or department of Interstate, and its agent in the conduct of the business. The companies had the same officers and directors. Stages' accounting records, though kept separately, were kept at taxpayer's office and by taxpayer's officers and employees. Stages never had any bank account. Its revenue and expenses were handled by taxpayer as its banker. It had no pay-roll. Employes below the classification of general officers (whose salaries were apportioned on the books) who participated in the conduct of the California business were carried only on taxpayer's payrolls and paid by taxpayer vouchers, without segregation for services performed in California. In-

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[1] On page 9.

terstate collected all Stages' revenue and paid all its bills, payrolls and otherwise (see 18, 43-46).

While in a very limited sense it is literally true, as recited in the findings, that Stages had its own accounting records, employes, buses, directors and corporate minute book, yet all employes of both companies were carried on Interstate payrolls and for all services performed, whether nominally for Interstate or Stages, were paid by Interstate checks. Payroll payments with respect to California operations were apportioned on a revenue motor coach mile basis (44). The findings do recite that taxpayer "paid all of the bills, payroll and otherwise, of Stages" (18).

Revenues were collected and retained by Interstate, and allocated on the books by assigning California intrastate revenue directly to Stages, and assigning interstate California revenue on a passenger mile basis (18, 44, 45). Total revenues thus allocated to Stages for 1936 were $183,365.60 (Respondent's Exhibit C, 77, 79) of which no more than something "in excess of" $10,000 represented intrastate revenues (38).[1] Expenses of carrying all traffic allocated to Stages were $211,470.59 (Respondent's Exhibit C, 77, 79). All this aggregate expense, under the uncontroverted evidence, was what it cost to carry on (through Stages' agency) the interstate operation admitted by the pleadings to have been engaged in by Interstate. The difference between the two figures of $211,470.59 and $183,365.60 (except for a minor and immaterial adjustment) represents the item of $28,100.66 [2] here in controversy. Taxpayer claims

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[1] The record does not show the exact figure. The estimate is that of the Vice President, and the amount was not controverted.

[2] The expense of carrying on the California part of the business was $211,470.59. The revenues allocated to California were $183,365.60. Taxpayer had the economic benefit

the right to this deduction as an ordinary and necessary expense of carrying on its business, through its agent, Stages.

The Circuit Court of Appeals, accepting what it termed "the theory that the expense of carrying intra-California traffic may be disregarded as insignificant", and "assuming that the subsidiary was an agent of the petitioner as a carrier of its interstate traffic in California", took the view (92) that the absorption contract did not place the obligation upon the ground of payment for any service rendered, because the amount of the deficit was "not made dependent upon any corresponding unit of benefit to the petitioner or sacrifice of the subsidiary", from which asserted circumstance the court, in complete disregard of the formal admission in the pleadings, concluded that "the deficit of 1936 was consequently an incident attributable wholly to the business of the subsidiary". The court held further (94) that the contract payment (although representing the excess of Stages' operating expenses incurred in conducting the taxpayer's business over revenues) was a capital expenditure, not an ordinary and necessary expense of taxpayer's business. In this connection the court made the assertion that the legal question involved had been "settled"; but in the same connection said that it was "not by unanimity of decision but by clear weight of authority", thus recognizing that there are contrary authorities. The court also rejected the taxpayer's contention that the close integration of the two companies was such as to make this a proper case for the application at taxpayer's instance of the "agency" doctrine, or doctrine of disregard of corpo-

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of the latter sum, bore the economic burden of the former sum, and therefore bore a net economic burden of only the amount by which such expenses, $211,470.59, exceeded $183,364.60, or (disregarding the slight and immaterial adjustment) $28,100.66.

rate entity, where two corporations are closely integrated. Although declaring that certain authorities cited by the petitioner presented "peculiar situations", the effect of the decision of the court below, if it represents the law, is that that under no conceivable circumstances may the "agency doctrine" be applied at a taxpayer's instance. Because as to both of these questions the authorities are in conflict and neither question has ever been authoritatively determined by this Court, this petition for review is presented.

JURISDICTION.

This being an application for a review of a final judgment of the Circuit Court of Appeals for the Eighth Circuit, the jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended (U. S. Code, Title 28, Section 347), and by Section 1141 of the Internal Revenue Code (U. S. Code, Title 26, Section 1141). The Circuit Court of Appeals had jurisdiction under the second of these sections, namely Section 1141.

The judgment of the Circuit Court of Appeals was entered July 31, 1942 (95). Timely petition for rehearing was filed which was denied September 8, 1942 (103).

Cases believed to sustain the jurisdiction are:

Old Colony Trust Co. v. *Commissioner,* 279 U. S. 716, 49 S. Ct. 499, 73 L. Ed. 918;

Magnum Import Co. v. *Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922;

Columbus Watch Co. v. *Robbins,* 148 U. S. 266, 13 S. Ct. 594, 37 L. Ed. 445;

Smith v. *Wilson,* 273 U. S. 388, 47 S. Ct. 385, 71 L. Ed. 699.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether in the case of a payment, pursuant to a contract obligation, and otherwise representing the ordinary and necessary expense of carrying on a taxpayer's business, by the taxpayer corporation to another corporation through which a part of the paying corporation's business is carried on without increased expense, but which is measured by the receiving corporation's deficit in carrying on such operations, is a capital or an ordinary expenditure.

2. Whether the "agency doctrine", so-called, by which under certain circumstances, separate corporate entities may be disregarded (which still is invoked at the instance of the taxing sovereignty), may no longer be invoked, at the instance of the taxpayer, and, accordingly, whether numerous past decisions applying this doctrine in taxpayers' favor no longer represent the law.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. As to the first question:

1. The decision of the tribunals below are on this question in conflict with the following cases:

> *Wiggin* v. *Commissioner,* 46 Fed. (2d) 743, (C.C.A. 1);
>
> *New York, Chicago and St. Louis R. R.* v. *Helvering,* 71 Fed. (2d) 956 (App. D.C.);
>
> *Western Maryland Ry.* v. *Commissioner,* 33 Fed. (2d) 695, (C.C.A. 4);
>
> *New York Central R. R.* v. *Commissioner,* 79 Fed. (2d) 247 (C.C.A. 2).

The first two of these cases were included by the court below in a footnote collection of cases, *pro* and *con* (94),

assertedly representing the authorities on the question whether a payment such as was here made is a capital or an ordinary expenditure. A majority of these cases included by the court in this footnote appear to support the result below; some are not in point (which is obviously true of *Welch* v. *Helvering*, 290 U. S. 111, 54 S. Ct. 18, 78 L. Ed. 212, the only decision of this Court included in the collection); and the first two cases listed above are in direct conflict with the result in this case. In the *Wiggin* case the court allowed the principal stockholder of a corporation who paid, under contract, the corporation's losses to deduct such losses as a business expense, as against the contention (identical with that made here) that such payments were capital advances, and notwithstanding an element in that case, not here involved, of tax avoidance. The *New York, Chicago and St. Louis* case was one involving advances in prior years to a lesser railroad by a lessee railroad which owned all the lessor's stock, which advances were held to be operating expenses of the years when made, as against the contention that the accumulated advances were deductible as a loss, or bad debt, in the taxable year.

In the *Western Maryland* and *New York Central* cases a successor corporation was allowed to deduct amortization of discount with respect to bonds of predecessor corporations, as against the contention that the discount suffered was suffered by the predecessor, and insofar as borne by the taxpayer, was part of the capital cost to the taxpayer of the predecessor's assets.[1]

The result below is contrary to the reasoning and dicta in *National Piano Mfg. Co.* v. *Burnet*, 50 Fed. (2d) 310 (App. D.C.) and *All Russian Textile Syndicate Inc.* v. *Commission*, 62 Fed. (2d) 614 (C.C.A. 2).

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[1] This Court denied certiorari in the *New York Central* case, 296 U. S. 653, 56 S. Ct. 370, 80 L. Ed. 465.

A more recent Board of Tax Appeals memorand n decision, by another member than the member deciding the present case, is squarely contrary to the result in the present case, *Shasta Water Co.* v. *Commissioner*, Docket No. 102772, not reported officially but available in the Commerce Clearing House Board of Tax Appeals service as Decision 12411-B[1]. There, on closely similar facts, a parent corporation's payment of a subsidiary's deficit was held deducible as an ordinary and necessary expense, as against the contention that it was not an expense of the taxpayer parent.

While the numerical weight of Circuit Court of Appeals decisions collected by the court below may appear to support the result below, many of these authorities collected are factually distinguishable. Admittedly, as the court below recognized, some authorities hold the opposite. There is no decision of the question by this Court. The decision below is in plain conflict with some of these cases, and especially in the *Wiggin* case.

2. This case involves, on this major point, an important question of Federal law which has not been but should be settled by this Court.

The case of *Welch* v. *Helvering*, 290 U. S. 111, 54 S. Ct. 18, 79 L. Ed. 212, the only one by this Court which is included in the authorities collected by the court below, is so obviously not in point on the question here presented that it is unnecessary to discuss it. It was distinguished by the Board itself in a case stronger on its facts for the Commissioner (*Miller* v. *Commissioner*, 37 B.T.A. 830[2]). It is

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[1] Also in Prentice-Hall B.T.A. Memorandum Decisions, paragraph 42077.

[2] The Commissioner announced his non-acquiescence in this Board decision, 1938-2 Cum. Bul. 51, but never appealed.

obviously of importance in the administration of the Revenue laws, and to business, that there be a settlement of the question whether a corporate taxpayer paying (in the ordinary course of business) a subsidiary's operating deficit, incurred in conducting the taxpayer's business, may deduct that expense from gross income, or whether, on the contrary, it is to be taxed on a net income actually though not legally greater than what is in fact its net income.

II. As to the second major question:

1. The decision of the Circuit Court of Appeals is in conflict with the recent Tenth Circuit decision in *Inland Development Co.* v. *Commissioner*, 120 Fed. (2d) 986.

The decision is also in conflict with the following, among other authorities:

> *North Jersey Title Insurance Co.* v. *Commissioner*, 84 Fed. (2d) 898 (C.C.A. 3);
> *U. S.* v. *Brager Building and Land Corp.*, 124 Fed. (2d) 349 (C.C.A. 4);
> *Munson Steamship Line* v. *Commissioner*, 77 Fed. (2d) 849 (C.C.A. 2);
> *Western Maryland Ry.* v. *Commissioner*, 33 Fed. (2d) 695;
> *New York Central R. R.* v. *Commissioner*, 79 Fed. (2d) 247 (C.C.A. 2), certiorari denied, 296 U. S. 653, 56 S. Ct. 370, 80 L. Ed. 465.

All of the above cases, and others, were cases in which separate corporate entities were disregarded at a taxpayer's instance They cannot be easily brushed aside as "depending on their own facts". The *Inland Development* case

is squarely contra.[1] So is the *Munson Steamship Line* case. The *North Jersey Title* and *Brager* cases involved situations where the formal separate entity of a corporation holding title to land, organized by and for the benefit of the taxpayer to overcome some legal or practical objection to direct ownership, was disregarded at the taxpayer's instance and income taxes thereby reduced. The view of the law taken in the present case is directly contrary, and appears to foreclose such relief in all cases. If the present decision is right, those cases are wrong. This is emphasized by two very late cases involving the *North Jersey* and *Brager* situation: one decided November 7, 1942, by the Circuit Court of Appeals for the Fifth Circuit, *Commissioner* v. *Moline Properties, Inc.*, not yet reported, but available in the Commerce Clearing House 1942 Federal Tax Service at paragraph 9728, on page 10717; the other, decided November 3, 1942, by the Eighth Circuit Court of Appeals, *Palcar Real Estate Company* v. *Commissioner*, not yet reported but available in the same service, at paragraph 9733, on page 10,728. Both these cases arrive at the same result as that of the decision below and are in harmony with it, but are squarely contrary to the *Inland Development Company*, *North Jersey Title Company* and *Brager*[2]

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[1] A good discussion of the *Inland Development* and *Brager* cases appears in the Fourth Circuit decision in *American Package Corporation* v. *Commissioner*, 125 Fed. (2d) 413, in which they were distinguished, but recognized as having properly applied the general rule. The conflict between the present case and the *Brager* case is seemingly recognized by the court below in its own footnote reference in its very recent decision in *Palcar Real Estate Company* v. *Commissioner*, decided November 3, 1942, not yet reported but published in the Commerce Clearing House 1942 Federal Tax Service, at paragraph 9733, page 10,728.

[2] The Commissioner did not apply for certiorari in either

cases. The Fifth Circuit cites in support of its result the Eighth Circuit's opinion below, in this very case now before the Court on the present petition. In the *Palcar Real Estate Company* case the Eighth Circuit does the same (by footnote reference) and recognizes that the *Brager* case is contra. The same footnote to the *Palcar Real Estate Company* case says further that it is unnecessary to review the decisions, adding that "some of them appear not to be wholly legally reconcilable on the facts set out in the opinions", thus recognizing the conflict in decisions of the Circuit Courts of Appeals. There is therefore a clear conflict on the fundamental question whether a taxpayer may ever invoke the doctrine of disregard of corporate entity.

2. The Circuit Court of Appeals has decided the present case contrary to three applicable decisions of this Court:

> *Southern Pacific* v. *Lowe*, 247 U. S. 330, 38 S. Ct. 540, 62 L. Ed. 1142;
> *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71, 39 S. Ct. 35, 63 L. Ed. 133;
> *Weiss* v. *Stearn*, 265 U. S. 242, 44 S. Ct. 490, 68 L. Ed. 1001.

No contention is made that these cases resemble the present one on their facts, or that, to borrow the language of the court below (93), they are to "be regarded as laying down any general rule authorizing disregard of corporate entity in respect of taxation". Yet these three cases were all instances in which such separate entity was disregarded to give relief to the taxpayers there involved. Under the doctrine of the decision below, that of the recent Fifth Circuit decision in the *Moline Properties, Inc.* case, and that of the court below in the *Palcar Real Estate Co.* case, that

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the *Inland Development Company, North Jersey Title Company*, or *Brager* cases.

such relief may never be had at taxpayer's instance, the result in those three cases decided earlier by this Court must have been wrong.

3. This case involves an important question of Federal law which has not been but should be settled by this Court.

The law today on the subject of "disregard of corporate entity" is in a hopeless muddle as to the question whether a taxpayer may ever invoke it to obtain tax relief, when he has himself been responsible for the existence of the problem. At one time, following the decision in *Southern Pacific* v. *Lowe* and *Gulf Oil Corporation* v. *Lewellyn*, a considerable body of law was developed, of which the *North Jersey Title* case is a good illustration, which supported the view that although ordinarily the separate entity should be respected, and while it would require much stronger facts evidencing agency in a case where it is the taxpayer that invokes the exception than one where it is invoked against him, yet where the facts are sufficiently strong of a showing that the entity sought to be disregarded was but an agent, or branch or department of another, the substance, not the form will be regarded and relief accorded. This Court did so in *Weiss* v. *Stearn*, 265 U. S. 242, 44 S. Ct. 490, 68 L. Ed. 1001, *supra*.

In the analogous situation arising under the National Bituminous Coal Act, two Circuit Courts of Appeals, the Seventh and Third, have reached diametrically opposite conclusions, in *Consolidated Indiana Coal Co.* v. *National Bituminous Coal Corp.*, 103 Fed. (2d) 124, and *Keystone Mining Co.* v. *Gray*, 120 Fed. (2d) 1, respectively. The arguments for each view are summarized in these opinions. Neither was an income tax case; and it may be that neither is now authoritative since this Court's decision, on a different ground, of the somewhat similar problem in *Powell* v. *Gray*, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. Adv. Op. 285; but these cases are illustrative of the conflicting views. The

Seventh Circuit decision rested heavily on *Southern Pacific* v. *Lowe*, *Gulf Oil Corporation* v. *Lewellyn*, and the *North Jersey Title* case.

This Court, however, in a dictum in *Higgins* v. *Smith*, 308 U. S. 473, 60 S. Ct. 355, 84 L. Ed. 406, suggested that a taxpayer having elected to do business as a corporation must accept the tax disadvantages, and that the Government might look at actualities and might "sustain or disregard the effect of the fiction as best serves the purposes of the tax statute". In the decision, this Court at the Government's instance, and in support of actualities, disregarded the separate corporate entity; but the dictum, treated as an authoritative holding that the taxpayer was in effect estopped ever to invoke the "agency doctrine", has apparently resulted in a noticeable but not unanimous tendency to reject the application of this doctrine in any case where it is the taxpayer that invokes it. Thus the court below, in the present case, and as a reason for ignoring actualities, quoted and followed this Court's dictum in the *Higgins* case. In the *Moline Properties, Inc.* case the Fifth Circuit, ignoring the recent *Brager* and *Inland Development Co.* cases and others to the contrary, cited and purported to follow the *Higgins* case. In the *Palcar Real Estate Company* case the Eighth Circuit says that as its members "read the expressions in *Higgins* v. *Smith*," they "must accept as settled that a corporation which has been conducting business activities as its own, for profit, is not in a position to claim the status of mere nominality for income tax purposes, in order to improve the tax position of its stockholder interests", adding the dictum that "the fact that the corporation may neither have been intended nor used to secure some other tax advantage is quite immaterial." Yet in the *Brager* case, decided after the *Higgins* case (and impossible to reconcile with the *Moline Properties, Inc.* case and now, in the *Palcar Real Estate Company* case, appar-

ently recognized by the court below to be inconsistent with the decision herein) the Fourth Circuit said of the *Higgins* case that "it is going too far to say that if a taxpayer forms a corporation for his convenience he is thereafter estopped from disclosing the true nature of the arrangement whenever it is of advantage to the government to recognize only the corporate form." The judges of that court, referring to the fact that the contrary had been held in many decisions, added that they "do not understand that this body of the law has now for practical purposes ceased to exist". The question here presented is therefore whether that body of law has "for practical purposes ceased to exist". Stated differently, does the dictum in *Higgins* v. *Smith* overrule *Southern Pacific* v. *Lowe*, *Gulf Oil Corporation* v. *Lewellyn*, and *Weiss* v. *Stearn*, and does it express this Court's disapproval of the *North Jersey Title*, *Brager*, *Inland Development Company*, and similar cases, and its approval of the *Moline Properties, Inc.* and *Palcar Real Estate Company* cases, and the rule applied below in the present case? If it is still the law that a taxpayer is not estopped from ever invoking the "agency doctrine", then the law is as it was, and each case turns to some extent on its own facts, just as is still the case in converse situations. If, however, there is such an estoppel, then it is submitted that the point should be made clear by this Court, so that the lower Federal courts and the profession generally may know that the older body of law has been superseded and can no longer be relied on, so that any further attempts by taxpayers to invoke the doctrine may be discouraged. The existing uncertainty and the importance of this question make this case an appropriate one for determination by this Court.

CONCLUSION.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this court for its review and determination, on a day to be therein named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket as Number 12247, *Interstate Transit Lines* v. *Commissioner of Internal Revenue*, and that the decision of the United States Board of Tax Appeals and the judgment of the United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

Dated at Chicago, Illinois, November 24, 1942.

Respectfully submitted,

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(Note: Since the legal propositions upon which petitioner relies have been discussed sufficiently in the foregoing petition, petitioner refrains, in the interest of brevity from appending a brief.)

APPENDIX.

Section 23(a) of the Revenue Act of 1936 provides: "In computing net income there shall be allowed as deductions: (a) Expenses — All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *"